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In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES OF AMERICA, APPELLANT

v.

WOMEN'S SPORTSWEAR MANUFACTURERS ASSOCIATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF IN BEHALF OF APPELLEES

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 87

THE UNITED STATES OF AMERICA, APPELLANT

v.

WOMEN'S SPORTSWEAR MANUFACTURERS ASSOCIATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF IN BEHALF OF APPELLEES

OPINION BELOW

The opinion of the District Court for the District of Massachusetts (R. 26-35) is reported in 75 F.Supp. 112.

STATEMENT OF THE CASE

This is a complaint filed by the United States under Section 4 of the Sherman Anti-Trust Act (15 U.S.C. 4) against the Women's Sportswear Manufacturers Association, its Executive Director, and its members, to prevent alleged violations by them, jointly and severally, of Section 1 of the Act (15 U.S.C. 1). After many allegations intended to establish the nature of the interstate commerce involved, the complaint sets forth the alleged offences charged (paragraphs 24, 25, R. 5, 6) and the effect of the alleged conspiracy (paragraph 26, R. 6). The case was heard in the District Court by Healey, D. J., who filed a memorandum of opinion containing findings of fact and a discussion of the law and

ordered judgment for the appellees (R. 26-35). The case is here on the Government's appeal.

The facts of the case. The Government accepts all the findings of fact made by the District Court. (Govt.'s brief, p. 4). So do the appellees,—and appellees in discussing the questions involved will confine themselves strictly to the facts as found. They can be summarized as follows:—

The appellees are persons, firms and corporations, called contractors, engaged in the business of stitching garments known as sportswear for jobbers located in the Boston Area. All of the appellees are located in and about Boston within the Commonwealth of Massachusetts. The jobbers for whom the contractors do this work are engaged in intrastate and interstate commerce, the latter amounting to at least 80% of the entire output. The garments at all times are the property of the jobbers, and the entire transaction between the jobber and his contractor takes place within the limits of the Commonwealth of Massachusetts. The cost of stitching the garment is approximately 25% of the sales price of the garment.

Beginning with March 1, 1944 the contractors' association attempted to make an agreement with the jobbers regarding the conditions under which the contractors would work for the jobbers. A proposed agreement (Plf's Ex. 3, R. 207, R. 45) was rejected by the jobbers who alleged it was illegal (R. 30). Work stoppages occurred in some of the shops of contractors working for some of the jobbers: the District Court found on conflicting testimony that the stoppages were ordered by the Association because the jobbers involved refused to sign the proposed agreement (Plf's Ex. 3, R. 31).

After work was resumed, further negotiations took place between the jobbers and appellees, and a new agreement

was drawn up between the parties and signed on October 17, 1944 (Plf's Ex. 4, R. 210, R. 49, R. 31). This agreement (Ex. 4) is substantially different from the proposed agreement (Ex. 3) which was rejected by the jobbers. After reciting the reasons for the execution of the agreement, namely, that both jobbers and contractors were in contractual relation with the Union (I.L.G.W.U.) (which furnished the workers) as to certain labor standards, rates of pay and other obligations to the workers, that the parties desired to expand and develop the Boston market, to establish fair and equitable dealings, to minimize industrial disputes, conflicts and difficulties, to remove present abuses and evils which cause such disputes, and to provide an inexpensive method of settling such disputes, the agreement provided that "the jobber should give all of his work to Association contractors available for performance of his work, provided such contractor was comparable as to price and quality of work with non-member contractors, but if a member withdrew from the Association, he could finish the jobber's work already in hand; or, if any non-member contractor was, at the time of the signing of the Association's agreement, employed by a jobber under contract, the jobber could continue to employ such contractor, even if he did not become an Association member. The jobber was required to distribute his work equitably among Association contractors engaged by him and to furnish the contractor with a written order setting out the price, and was forbidden to receive secret rebates from the contractor. The jobber was required to deduct from the amount due the contractor, a sum computed by the defendant Association to cover unemployment compensation, insurance and the health and vacation fund of the contractors' employees. Compulsory arbitration of disputes between jobber and contractor was

provided for, as were the mechanics for arbitration. All individual agreements between jobber and contractor were made subject to the provisions of this agreement. Other provisions required the Association to assist the jobber in getting sufficient contractors to do his work. The contractor agreed to complete all orders given him with due regard to the delivery dates set forth in the orders; and both the contractors and jobbers agreed that there should be no pirating of styles, and that styles submitted to a contractor by a jobber would not be submitted by the contractor to any other jobber." (R. 31)

The District Court found further that the agreement was still in force at the time the complaint was filed, but there was little, if any evidence as to just how the arrangement worked out (R. 32). It found that one of the purposes of the Association was to maintain the standard of prices charged the jobbers for doing the stitching operations on the sportswear garments in the Boston area (R. 32).

The District Court expressly found that none of the appellees performed any work outside of Massachusetts or received from or shipped to any jobber or anyone any goods outside of Massachusetts. Nor did they attempt to fix the wholesale or retail prices of women's sportswear or to boycott any concern or interfere with the manufacture or sale of its goods outside of Massachusetts (R. 32).

The Court made no findings of fact in regard to the number of jobbers who performed some or all of the stitchwork themselves (Govt's brief p. 5), or that the proposed agreement (Plf's Ex. 3) did not differ materially from the agreement subsequently executed (Plf's Ex. 4), or that it was in violation of the anti-trust laws. (The Court stated the jobbers said the proposed agreement was illegal) (R. 30). Nor did the Court find as fact that there was substantial

uniformity in prices charged by the contractors[1] (Govt's brief, p. 10), nor what was the nature of the discussions, which took place at meetings of the Association as to prices received by the contractors (Govt's brief, p. 10), nor what was the true situation or meaning of the testimony quoted by the Government in its brief (p. 10), much of which is torn from its context or at variance with other testimony of the same witness.[2]

It is idle, too, to enter into a discussion as to what is the true meaning of the various extracts of the minutes of the Association (Govt's brief, p. 10). There is no evidence of what action, if any, was taken, and the District Court made no finding in regard thereto.

Contrary to what the Government urges in its brief (p. 11) as to the "attempted Labor Union Orientation of the Agreement", there is a real basis for the statement in the preamble of the agreement executed between the jobbers and appellees (Ex. 4), in that practically all of the jobbers and contractors in the Boston Area were in contractual relations with the Union; and there is no evidence that any of the appellees employed non-union workers, regardless of whether or not the contractors had a contract with the Union. And though the District Court found as a fact that there was no evidence that the Union participated in drawing up the proposed agreement between the jobbers and contractors (R. 31), it is very evident that Philip Kramer, the Manager of the Local Union, was very much interested

[1] The witness testified that prior to the signing of the agreement there was no difference in prices charged by the contractors and that since the signing of the agreement (Plf's Ex. 4) there was no difference (R 147).

[2] Compare the testimony of the witness Henry Webber as quoted above "whether some is working for less than the other". (R 95) with his testimony on cross-examination to the effect that except for the general talk about prices, no action was taken about prices at any of the meetings, that witness was never told what prices he should charge, and the Association never interferred with him as to what prices he should charge his jobber (R 97).

in having both the jobbers and contractors form a tripartite agreement with the Union (R. 170), and many of the terms of the agreement (Ex. 4) as executed between the jobbers and contractors were based on the terms of the agreement between the Union and the jobbers (R. 177 ff).

From its findings of fact the District Court concluded that "there is no evidence of any intent on the part of the defendants, who had no direct and immediate connection with or control over interstate commerce, to burden interstate commerce. There is no evidence of any direct and immediate restraint upon interstate commerce resulting from the defendants' activities, from which an illegal intent can be inferred. They did not seek to monopolize the supply of sportswear garments, or to control its price, or to discriminate between would-be purchasers. Their activities were purely local and directly affected only the manufacture of women's sportswear in Massachusetts. The effect of their activities on interstate commerce was indirect and too remote to bring them within the condemnation of Section 1 of the Sherman Act", and concluded that "none of the defendants committed any violation of the Sherman Act as alleged in the complaint", and ordered judgment for the defendants (R. 35).

In connection with its appeal the Government filed its assignment of errors (R. 224) but evidently now is relying only upon its first and second assignment of errors. (Govt's brief p. 15).

Questions Presented

The questions raised by this record are

(1.) Are the activities of appellees part of interstate trade or commerce, and subject to the Sherman Act,

(2.) Does the agreement of October 17, 1944 between the

jobbers and the appellees constitute an unreasonable restraint upon the jobbers in violation of Section 1 of the Sherman Act?

Summary of Argument

Appellees contend that they are not at all engaged in trade or commerce as comprehended by the Sherman Act, in that their activities form no part of a stream of interstate commerce, that all of appellees' activities are performed wholly within the limits of Massachusetts and so do not constitute interstate activities.

The most that can be said about appellees' activities is that the appellees are engaged in production for trade or commerce, and where the production is purely intrastate, acts done to restrain production are not in violation of the Sherman Act.

The case of *Mandeville Island Farms, Inc. et al.* v. *American Crystal Sugar Co.*, 334 U.S. 219, which was decided on its own peculiar facts, is not in conflict with the foregoing statement.

The agreement of October 17, 1944 (Ex. 4) did not constitute an unreasonable restraint upon the interstate activities of the jobbers. The agreement is a means of policing an industry, an attempt at self-regulation to eliminate evils therein and does not have as its purpose an intent to control prices or limit production or to restrain competition. Any effect on interstate trade is purely incidental and does not constitute an unreasonable restraint forbidden by the Sherman Act. Cases decided by this Court on matters arising under the Fair Labor Standards Act (29 U.S.C. 201) or National Labor Relations Act (29 U.S.C. 151) wherein intrastate activities were held within the purview of those Acts because such activities "affected" interstate commerce are

not in point. There is a wide difference in legal interpretation between the words "affect" and "restrain".

The findings of fact show that defendants did not directly, inevitably and substantially affect the interstate commerce of the jobbers. Absent the findings of fact is the existence of any conspiracy on the part of the appellees to restrain interstate commerce, or any intention on the part of the appellees to restrain the interstate commerce of the jobbers by price fixing, boycotts, or eliminating competition.

Argument

Reduced to its basic element, the Government's brief is a plea to this Court to declare that if two or more persons co-operate with each other to make an agreement with a third person which in any way relates to the interstate trade or commerce of said third person, the said two or more persons are violating the Sherman Act, regardless of what is the extent of the subject matter of said agreement and regardless of whether or not the said two or more persons operate in one or more states. The Government earnestly pleads with this Court to drop all distinctions which it has formerly made between the Sherman Act and the Fair Labor Standards Act or the National Labor Relations Act as to the scope of interstate commerce involved, and to disregard all distinctions between the words "restrain" and "affect". It also urges this Court to forget all state lines and to extend the doctrine of causal relationship of goods shipped in interstate commerce to all the ingredients, services, and acts which in any degree contributed to the final transaction in interstate commerce, and to declare agreements between two or more persons on one side with any number of persons on the other side violations of the Sherman Act regardless of evidence of actual restraint

or intention to restrain interstate commerce. To do this, the Government conjures up the stream of commerce theory. This, the Government contends, is the meaning of the Mandeville case (cited supra), a contention with which appellees do not agree.

Before proceeding with its presentation of cases which the appellees contend govern the situation disclosed by the record in this case, it may be advisable to discuss the Mandeville case upon which the Government lays so much stress. In the first instance, it must be noted that the Mandeville case came up on an appeal from a judgment dismissing the complaint on the ground that the amended complaint was insufficient to state a cause of action. The decision of this Court is to the effect that assuming plaintiff proves all the facts alleged, a sufficient cause of action is stated. As the Court says:

> "The main question is whether, in the circumstances pleaded, California sugar refiners who sell sugar in interstate commerce may agree among themselves to pay a uniform price for sugar beets grown in California without incurring liability to the local beet growers under the Act. Narrowly the question is whether the refiners' agreement together with the allegations made concerning its effects shows a conspiracy to monopolize and to restrain interstate trade and commerce or one thus affecting only purely local trade and commerce." (334 U.S. 219, 221)

Then follows a statement of the allegations and of its effects which coupled with the refiners' agreement show the "peculiarly integrated character of the industry, effects of the arrangements upon interstate commerce, and the relation

between the violations charged and the injuries suffered by petitioners" (334 U.S. 219, 224). Further, the amended complaint charged that respondent had unlawfully conspired with . . . refiners to "monopolize and restrain trade and commerce . . . and to *unlawfully fix prices to be paid growers*" (italics supplied) and that each refiner no longer competed against the others as to the price to be paid the growers, but paid the same price on the agreed uniform basis of average net returns. (334 U.S. 219, 225). It was also alleged that as a result of the alleged conspiracy respondent did not operate as efficiently as before, that respondent received less in sales returns than previously and incurred greater expenses than if competition had been free, and petitioners did not receive the reasonable value of their sugar beets; that as a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, that the refiners became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system (334 U.S. 219, 226).

Compare these allegations with the facts found by the District Court in the case at bar. In the Mandeville case the defendant was admittedly engaged in interstate activities; in this case the defendants are found not to be engaged in interstate activities (R. 32, 33). In the Mandeville case, the conspiracy was directed to fixing the prices to be paid the growers of the sugar beets; in this case none of the appellees attempted to fix wholesale or retail prices of women's sportswear (R. 32, 33). In the Mandeville case there was a direct allegation of unreasonable restraint of interstate commerce; in this case there is no finding that the appellees' acts had any effect on interstate commerce.

either as to volume or price or competition between the jobbers locally or with the jobbers operating in the other market centers. In the Mandeville case there was also a direct allegation that interstate commerce was intentionally hindered and obstructed; in this case, the District Court stated "there is no direct evidence that these defendants had any intention of restraining interstate commerce in cloth or in the finished sportswear garments." (R. 33). The District Court further stated there was no basis upon which to predicate an inference of illegal intent (R. 33).

The Court in the Mandeville case took the position that the test whether or not activities occuring wholly within the limits of one state came within the purview of the Sherman Act depended not on a geographical basis but upon a realistic appraisal of the effect of such activities upon interstate commerce.

However, it is not enough to show that the activity is a step in the total process which leads up to the shipment in interstate commerce; and to say that because stitching a garment is a necessary step in the production of the garment which may ultimately find its way into interstate commerce is not enough upon which to base the right of the Government to seek injunctive relief under Section 4 of the Sherman Act.

To quote again from the Mandeville case:

> "In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts pre-

sented." For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others became remediable under the Act's prescribed methods, including the treble damage provision." (334 U.S. 219, 234)

And in the footnote to the passage just quoted the Court referred to its former holding in *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 297, as follows:

> "It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce."

Again quoting from the Frankfort Distilleries case, "there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the States". 324 U.S. 293, 297.

The conduct or activities of the appellees can in no way be considered "an inseparable element of a larger program

dependent for its success upon activity which affects commerce between the States," inasmuch as appellees only do at least 50% of all the stitching of women's sportswear in the Boston area (R. 29) and only 65% of all women's-sportswear produced in Boston is handled by the appellees, of which 80% is sold to purchasers outside of Massachusetts (R. 29). Boston is only the fifth largest manufacturing center of such sportswear and its production is sold in competition with like goods manufactured in other areas (R. 29). Unlike the Mandeville case, the District Court was not dealing with an industry tightly interwoven through all its intermediate stages to and including interstate sale, in the middle of which processes and dominating all of them stood the appellees. On the contrary, there was no evidence of price fixing or of any change in prices or lack of competition between contractors as a result of the organization of the contractors' Association or the signing of the agreement between the Association and the jobbers (Pltf's Ex. 4).

On the facts alleged in the Mandeville case, the refiners acquired not only a monopoly of the raw material but also, and thereby, control of the quantity of sugar manufactured, sold and shipped interstate from the Northern California producing area. There is no finding of monopoly or control of women's sportswear in the case at bar. To apply the doctrine of the Mandeville case to the one at bar is to ignore the facts of industrial life.

Appellees are not engaged in interstate trade or commerce. Taking up again the thread of appellees' argument, the appellees contend that they are not engaged in interstate trade or commerce. Their activities consist solely of stitching garments which belong to the jobbers, and which have been cut by the jobbers from cloth belonging

to them. The Government invokes the theory of the stream of interstate commerce and paints a picture of cloth moving from mills outside of Massachusetts and ending up in garments shipped from Massachusetts to points outside. The trouble with the picture is that there is no such stream. When the cloth arrives from the mills outside the State at the jobbers' place of business, its interstate journey is then at an end. The cloth is no longer in interstate commerce; every taxing authority will take that position and this Court will sustain the taxing authority's position.

Hoover & Allison Co. v. *Evatt*, 324 U.S. 652, 666.
F. May & Co. v. *New Orleans*, 178 U.S. 496.

It matters little how long the cloth thereafter remains in the jobbers' place of business, because the cloth is thereafter transformed into garments, being cut, stitched, lined and fitted with buttons and other ornaments. A substantial change has taken place in the form and character of the original cloth, and a substantial addition has been made thereto. And it is after this substantial change has been made that the finished garment may begin a new trip in interstate commerce.

The activities of the appellees lie between the end of one journey and the beginning of a new journey in interstate commerce, and so much has happened in between that it cannot be said that the second journey is the continuation of the first one.

These intrastate activities of the appellees are no part of interstate trade or commerce; the most that can be said of these appellees is that they are engaged in production for trade or commerce.

Where the production is purely intrastate, as is the case

here, acts done by the appellees to restrain production are not in violation of the Sherman Act.

United Mine Workers v. *Coronado Coal Co.*, 259 U.S. 344
U.S. v. *National Assn. of Window Glass Mfrs.*, 287 F. 228

Where the appellees are not directly engaged in interstate commerce, their activities intrastate are not subject to the Sherman Act unless it is shown that their activities are intended to restrain interstate trade or commerce by fixing prices and/or eliminating competition to the damage of the ultimate consumer.

Apex Hosiery Co. v. *Leader*, 310 U.S. 469
Chicago Board of Trade v. *U.S.*, 246 U.S. 231
Appalachian Coals v. *U.S.*, 288 U.S. 344

And in the absence of any proof of such intention, it must be shown that the activities complained of must directly, inevitably and substantially affect interstate trade or commerce.

Anderson v. *U. S.*, 171 U.S. 604
Standard Oil Co. v. *U. S.*, 221 U.S. 1
Appalachian Coals v. *U.S.*, 288 U.S. 344

The Agreement as Executed Does Not Restrain Interstate Trade or Commerce within the Meaning of the Sherman Act

In its brief the Government argues "Appellees' plan was designed to *interfere* with the business of the jobbers . . . (italics supplied). In concertedly refusing to work for any jobber who would not deal with them exclusively, appellees

threatened to destroy the jobbers' entire business and thus to halt both the outgoing shipments of sportswear and incoming shipments of cloth." (Govt's brief p. 15). This statement is arrant nonsense and is directly in contradiction with the finding of the District Court that "None of the defendants attempted to fix wholesale or retail prices of women's sportswear or *to boycott any concern or interfere with the manufacture or sale of its goods outside of Massachusetts*" (R. 32) (italics supplied).

The Government's brief further says (p. 16), "In addition a purpose and undoubtedly *an effect of the scheme* was to stabilize prices paid to contractors by jobbers" (italics supplied). The District Court's finding is, "There is little, if any, substantial evidence as to just how the arrangement worked out. One of the purposes of the Association was to maintain the standard of prices charged the jobbers for doing the stitching operations on the sportswear garments in the Boston Area" (R. 32). One can easily see how unwarranted is the Government's statement as to the effect of the scheme. The same criticism can be levelled at the Government's statement in its brief (p. 16) that the "obvious consequences of the plan were to restrain interstate commerce".

Beyond the District Court's statement in its discussion "Unquestionably the prices charged by these contractors for stitching sportswear garments, are reflected in the wholesale and retail prices of the finished garments. Also, any work stoppage on the jobbers' goods would slow down the stream of sportswear entering into interstate commerce and the purchase of cloth from out of state mills, as well as the taking of orders for finished garments in other states," (R. 33)

there is not the slightest scintilla of evidence in the record that any prices of the finished garments were raised or lowered, or any flow of finished garments or cloth from mills diminished or slowed down, as the result of any of the activities of the appellees or as a result of the execution of the agreement.

The entire Government's argument as outlined in its brief on pages 17 and 18 is based upon the erroneous assumption that the appellees were guilty of "an actual and threatened boycott against jobbers who refused to deal with them exclusively, *have* required that work be allocated 'equitably'—and therefore not on a competitive basis—among the contractors engaged by a jobber and *have* acted in a manner designed to maintain price standards and eliminate price competition," (italics suppled)—an assumption that is diametrically opposed to the flat finding of the District Court that none of the appellees have boycotted or interfered with any concern (R. 32). Then follows another erroneous assumption as to the requisite effect upon interstate commerce (Plf's brief p. 17) which is diametrically opposed to the District Court's opinion that "such results do not constitute sufficiently direct and immediate effects upon interstate commerce upon which to predicate an inference of illegal intent" (R. 33).

The vice or flaw in the Government's position is best exemplified by its statement on page 19 of its brief,—"This Court has frequently held that the Sherman Act extends to intrastate activities which *affect or restrain* interstate commerce", thus trying to create the impression and pass along the idea that the words "affect" and "restrain" mean exactly the same thing. And it is in this connection that the Government cites cases like *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1,

and *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601. While the test applied in Sherman Act cases has been the test applied under the commerce clause of the Constitution itself, and Congress admittedly has broad power to legislate with respect to interstate commerce, the fact of the matter is that Congress did not exercise all its power with respect to the Sherman Act, and legislated to different extents with regard to the Sherman Act, the Fair Labor Standards Act and the National Labor Relations Act. And it is not for this Court to make up the legislative difference.

The United States Circuit Court of Appeals in Pennsylvania fell into this error in the first case of *Leader* v. *Apex Hosiery Company* (90 F.(2) 155) and applied the standards of the Fair Labor Standards Act and National Labor Relations Act as to the scope of the legislation by Congress, but when the case came before it again (*Leader* v. *Apex Hosiery Company*, 108 F.(2) 71) it reversed itself, saying at p. 80, "This Court in its opinion in the previous suit between the same parties (90 F.(2) 155, 159) placed emphasis on the expanded meaning of commerce purportedly created by the National Labor Relations Act (29 U.S.C. 151, 166) and the decision of the Supreme Court in *National Labor Relations Board* v. *Jones and Laughlin Steel Company, National Labor Relations Board* v. *Friedman-Harry Marks Company*. The word 'commerce' under this expanded definition was construed to include the activities of the defendants and their agents. We now conclude that this was unwarranted. Congress used a very broad word 'affect' in the National Labor Relations Act, thus evidencing its intention to embrace the entire field of interstate commerce confided to it by the Constitution. Upon the other hand, in the Sherman Act, Congress employed the word 'restraint' which has a different, and plainly more

restricted connotation. That this is so becomes the obvious in the light of the Supreme Court decision which we have already discussed, in which it is declared that Congress intended to legislate only in respect to unreasonable restraints of commerce. In other words, in order to come within the purview of the Sherman Act and thus to confer jurisdiction upon the Federal Courts, commerce must not only be affected, but must also be restrained and restrained to an unreasonable degree."

Congress has not exercised all its power over interstate commerce with regard to the Sherman Act as a whole. In *U. S.* v. *Frankfort Distilleries* (cited supra) this Court said, at p. 297, "It is true that this Court has on occasion determined that local conduct could be insulated from operations of the Anti-Trust Laws on the basis of the purely local aims of a combination, in so far as these aims were not motivated by the purpose of restraining commerce, and where the means used did not directly touch upon interstate commerce. The cases relied upon by respondents fall within this category. All of them involved the application of Anti-Trust Laws to combinations of businessmen or workers in labor disputes and not to interstate commercial transactions. On the other hand, the *sole ultimate object* of the respondents' combination in the instant case was price fixing or price maintenance. *And with reference to commercial trade restraints such as these*, Congress in passing the Sherman Act left no area of its constitutional power unoccupied: it exercised all the power it possessed. *Apex Hosiery Company* v. *Leader*, 310 U.S. 469, 495." (italics supplied)

The Sherman Act does not condemn every contract, agreement, combination or conspiracy which may in some degree affect or interfere with interstate commerce. *Apex Hosiery*

Company v. *Leader*, 310 U.S. 469, 486. There is still left an area in which an industry can police itself, and combinations may be effected between members of an industry to eradicate evils, provided there is no intentional restraint on interstate commerce, or that the activities do not have such a direct and immediate effect upon interstate commerce that the court is enabled to draw an inference that they were intended to restrain such commerce.

Apex Hosiery Company v. *Leader*, 310 U.S. 469
United Mine Workers v. *Coronado Coal Company*, 263 U.S. 295
United Leather Workers v. *Herkert*, 265 U.S. 475
Industrial Association v. *U. S.*, 268 U.S. 64.

In *Swift & Company* v. *U. S.*, 196 U.S. 375, the court held that the combination also embraced and was directed against commerce in other States. Holmes, J. in that case said that some separate elements of the plan were lawful, but when bound together by an unlawful scheme to monopolize interstate commerce, the whole plan and its parts were unlawful. *The agreement of October 17, 1944 (Exhibit 4) is not an unreasonable restraint of trade or commerce.* All restraints of trade, whether in local or interstate commerce, are not in violation of law, and it is still possible to enter into business agreements which restrict the actions of the parties thereto without running foul of any law. Any concerted action per se is not in violation of the Sherman Act. It depends upon the attendant circumstances.

Appalachian Coals v. *U. S.*, 288 U.S. 344.

The Sherman Act is designed or intended to prohibit unreasonable restrictions upon interstate trade or commerce.

Standard Oil Company v. *U. S.*, 221 U.S. 1.

The evil at which the Sherman Act was aimed was not the policing of the entire field of interstate commerce. "The end sought (by the enactment of the Sherman Act) was the prevention of restraints to free competition in business and commercial transactions which tended to raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had become to be regarded as a special form of public injury."

Apex Hosiery Co. v. *Leader*, 310 U.S. 469, 493

The phrase "restraint of trade" had a well understood meaning at common law, and it was in this sense used in the Sherman Act. "In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman Law they took over that concept by condemning such restraints wherever they occur in commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both public and private remedies for the injuries flowing from such restrictions."

Apex Hosiery Co. v. *Leader*, 310 U.S. 469, 497, 498

"It must now be accepted as the settled doctrine of this Court that the word "restraint" as used in Section 1 of the Sherman Act, means "unreasonable restraint", and that the definition of the words "unreasonable restraint" means fixing prices or eliminating competition to the damage of the ultimate consumer. A large area is therefore left open to individuals, firms and corporations wherein they can unite in action which puts some restriction upon the activities of persons engaged in interstate commerce but does not have either the actual intention to fix prices or eliminate competition to the damage of the ultimate consumer or, lacking the actual intention to do so, have the inevitable result of so doing.

The activities of the appellees as described by the District Court, even though they might restrict the activities of the jobbers, fall outside the scope of the Sherman Act. Freedom from restraint for the jobbers does not mean unlimited license to conduct their business to the damage or detriment of their contractors, to engage in shady devices, to get secret rebates, or to force down prices which the contractors must receive to pay a living wage to their workers, or to break down all the improvements in the lot of the working man which the union has succeeded in establishing by means of health and vacation payments.

Many evils can crop up in the conduct of a business which are not encompassed in a scheme to raise prices or to eliminate competition, the elimination of which evils by agreement has an indirect and insignificant effect upon prices or volume. In the absence of an intention directly to control prices or eliminate competition, or to follow a course of conduct, the natural and inevitable result of which is to

control prices or eliminate competition, from which such an intent can be inferred, the whole realm of agreement or concerted action lies outside the scope of the Sherman Act.

This Court held in *Appalachian Coals* v. *U.S.* (288 U.S. 344, 373) "A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. . . . The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."

To the same effect is the case of *Chicago Board of Trade* v. *U. S.*, 246 U.S. 231. In that case it was held that the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti Trust Law cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. There can be no doubt as to the category in which the case at bar falls. The findings of the District Court settle that question. The agreement of October 17, 1944, and the activities of the appellees were not intended to and did not in fact suppress or destroy competition.

Conclusion

It is evident from the record in this case that appellees are not engaged in activities which unreasonably restrain interstate trade or commerce, nor have they entered into any agreement or conspiracy so to do. The decree of the District Court dismissing the complaint should, therefore, be affirmed.

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Blanchard Printing Company, Boston, Mass.—9/29/48-(60)